

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals  
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DATE: November 9, 1999

CASE NO: 1997-INA-321

*In the Matter of*

DAWN & CASEY JONES  
Employer

*on behalf of*

ROSITA C. SERDENIA  
Alien

Appearances: Dan E. Korenberg, Esq.  
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner  
Administrative Law Judges

DONALD B. JARVIS  
Administrative Law Judge

**DECISION AND ORDER**

This case arises from Dawn & Casey Jones' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the

employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

### **Statement of the Case**

On January 9, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Rosita Cruz Serdenia. (AF 190-91). The job opportunity was listed as "Cook, Domestic". (AF 190). The job duties were described as follows:

Plans menus, cook, bake, and serve meals in private home for family members and guests. Plan and prepare weekly menu for employer's approval as per employer's requirements and guest lists; Prepare low sodium, non cholesterol, nutritionally balanced & aesthetically pleasing dietary meals and fancy foods, decorated according to occasion; Purchase foodstuff and supplies; Bake breads, pastries, pies & desserts; Carve, cook, season, boil, saute, steam, baste, stir meats, poultry and fish as per occasion; Prepare soybean meats, grain metas [sic] & vegetables on daily basis; Decorate foods and party trays; Do seasonal cooking, such as preserving and canning fruits & vegetables; Set table; Serve foods and refreshments; Maintain kitchen and storage areas clean & hygienic; Wash dishes, pots, pans, and utensils; Clean oven, refrigerator, freezer and kitchen appliances.

(Id.). The stated job requirements for the position, as set forth on the application, are six years of grade school plus two years experience in the job offered. Other special requirements were listed as "Must be able to speak English. Must prepare nutritionally balanced food." (Id.).

The CO issued a Notice of Findings ("NOF") on March 22, 1996, proposing to deny certification. (AF 183-188). First, the CO found that the duties described by employer did not appear to constitute full-time employment in the context of employer's household and questioned whether the job was truly open to U.S. workers, citing 20 C.F.R. 656.3 and 656.20(c)(8). (AF 184-185). The CO instructed the Employer to provide evidence to establish that the position as performed in the Employer's household clearly constitutes full-time employment and that the job has not merely been created for the alien. (AF 185-186). Additionally, the CO found that the job offer involves working a split shift which is not customary for the occupation of household domestic worker and therefore must be justified by documentation, citing 20

C.F.R. 656.24(b)(3). (AF 186). Second, citing 20 C.F.R. 656.20(c)(1) and 656.20(c)(4), the CO found that the Employer must document the ability to hire a full-time cook at the wage offered of \$12.16 per hour. (AF 186-187).

The Employer submitted its rebuttal to the NOF on May 24, 1996, in the form of letters from Employer and Employer's counsel and personal tax information. (AF 150-82). The Employer's counsel charged the NOF with being vague and "grossly inadequate" and argued that since the CO did not require "specific documentation, a statement from the employer would be sufficient evidence to satisfy the request." (AF 151). The rebuttal statement listed dates of past social events hosted by Employer, along with the number of people who would attend each event. Employer gave the schedule of the household and asserted that the child will be cared for by Employer. Further, Employer stated that the general housekeeping duties will be performed by a housekeeper, however, Employer did not provide documentation of the housekeeper's services. (AF 153-54).

The CO issued a Final Determination ("FD") on July 23, 1996, denying certification. (AF 146-49). The CO found that the rebuttal did not account for a full-time cook position during the hours described on the application. (AF 149). Although Employer submitted the schedules of members of the household, the CO concluded that for the majority of the cook's work day, the house would be vacant. (Id.). In addition, the CO noted that although the employer alleges that an unnamed independent contractor performs the housework, this is not supported by an documentation, nor is the person named. (Id.). For these reasons, the CO stated that she could not find that the cook position is full-time or that the labor certification position is truly open to any U.S. worker.

The Employer filed a Motion to Reconsider and a Request for Review on August 21, 1996. (AF 2-145). The CO denied the Request for Reconsideration and the file was forwarded to this Board of Alien Labor Certification Appeals ("BALCA") for review. (AF 1).

### **Discussion**

In *Carlos Uy, III, 1997-INA-304* (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a *bona fide* job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

This matter falls squarely within our holding in *Uy*. Therefore, we hold as stated in *Uy* that: In view of the lack of clarity in the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind

to bolster his contention that he has a bona fide job opportunity for a Domestic Cook. The CO shall than consider the existing record and any supplemental documentation submitted by Employer and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Slip. op. at 16-17.

Accordingly, this matter will be remanded for the issuance of supplemental NOF for reevaluation of the application consistent with the *en banc* decision in *Uy*. See also *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*).

**Order**

The Certifying Officer's denial of labor certification is hereby VACATED and the matter REMANDED for further development of the case.

For the Panel:

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DONALD B. JARVIS  
Administrative Law Judge

San Francisco, California